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REPORT OF THE WORKING GROUP ON INSOLVENCY LAW ON THE WORK OF ITS TWENTY-FIRST SESSION (New York, 20-31 January 1997)

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INTRODUCTION

1. At the present session, the Working Group on Insolvency Law continued its work, undertaken pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995) on the development of a legal instrument relating to cross-border insolvency.[1]

2. Prior to the decision to undertake work on cross-border insolvency, UNCITRAL and the International Association of Insolvency Practitioners (INSOL) held a Colloquium on Cross-Border Insolvency (Vienna, 17-19 April 1994), involving insolvency practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders (A/CN.9/398). Its purpose was to assess the desirability and feasibility of work in that area, and to define appropriately the scope of the work. The suggestion arising from the Colloquium was that work by the Commission should, at least at the initial stage, have the limited but useful goal of facilitating judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings.

3. Subsequently, an international meeting of judges was held specifically to elicit their views as to work by the Commission in that area (UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency, Toronto, 22-23 March 1995) (A/CN.9/413). The view of the participating judges and government officials was that it would be worthwhile for the Commission to provide a legislative framework, for example by way of model legislative provisions, for judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings.

4. The Working Group commenced its work on the project at its eighteenth session by discussing possible issues to be covered in a legal instrument dealing with judicial cooperation and access and recognition in cross-border insolvency (A/CN.9/419).

5. At its nineteenth session, the Working Group considered a set of draft legislative provisions on judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings (A/CN.9/422).

6. At its twentieth session, the Working Group focused on revised articles of the text, entitled the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency. At that session the Working Group also considered the question of the form of the instrument being prepared. A number of views and arguments were considered in favour of preparing model provisions for national legislation, model provisions for an international treaty and an international treaty. After considering the various views, the Working Group decided to continue and complete its work on the draft Model Legislative Provisions. That would not exclude the possibility of undertaking work towards model treaty provisions or a convention on judicial cooperation in cross-border insolvency, if the Commission at a later stage so decided (A/CN.9/433, paras. 16-20).

7. The Working Group held the present session in New York from 20 to 31 January 1997. The Working Group was composed of all States members of the Commission. The session was attended by representatives of the following States members of the Working Group: Algeria, Australia, Austria, Bulgaria, China, Egypt, Finland, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Mexico, Nigeria, Poland, Russian Federation, Saudi

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[1] Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 382-393.

Arabia, Singapore, Slovakia, Spain, Sudan, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania and United States of America.

8. The session was attended by observers from the following States: Angola, Bangladesh, Burkina Faso, Canada, Côte d'Ivoire, Croatia, Czech Republic, Ireland, Kuwait, Lesotho, Netherlands, Pakistan, Republic of Korea, South Africa, Sweden, Switzerland, Syrian Arab Republic, Turkmenistan and Uzbekistan.

9. The session was also attended by observers from the following international organizations: European Insolvency Practitioners Association (EIPA), Hague Conference on Private International Law, Instituto Iberoamericano de Derecho Internacional Económico, International Association of Insolvency Practitioners (INSOL), International Bar Association (IBA), International Bar Foundation, International Chamber of Commerce (ICC), International Women's Insolvency and Restructuring Confederation (IWIRC) and Union Internationale des Avocats (UIA).

10. The Working Group elected the following officers:

Chairman: Ms. Kathryn Sabo (Canada)

Rapporteur: Mr. Joseph F. Bossa (Uganda)

11. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.V/WP.47) and a note by the Secretariat containing newly revised articles of the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency (A/CN.9/WG.V/WP.48), which was used as a basis for the Working Group's deliberations.

12. The Working Group adopted the following agenda:

1. Election of officers.

2. Adoption of the agenda.

3. Consideration of newly revised articles of the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency.

4. Other business.

5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

13. The Working Group considered the newly revised articles of the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency presented in the note by the Secretariat (A/CN.9/WG.V/WP.48). It first considered draft articles 15 to 22 and thereafter draft articles 1 to 14. For lack of time, the Working Group did not consider draft article 23. At the end, the Working Group considered principles relating to possible new provisions on concurrent proceedings.

14. As the Working Group progressed with its consideration of document A/CN.9/WG.V/WP.48, it established an informal drafting group to revise the draft Model Legislative Provisions, reflecting the deliberations and decisions that had taken place. The informal drafting group prepared revised provisions, except for articles 12, 13, 14 and 22. The deliberations and conclusions of the Working Group are set forth below in chapter II. The annex to the present report reproduces the draft articles proposed by the informal drafting group and articles 12, 13, 14 and 22 as revised by the Secretariat pursuant to the considerations of the Working Group. The Working Group did not have time to review the draft articles that had been prepared pursuant to its consideration.

15. The Working Group took note of a number of improvements suggested to the various language versions of the draft Model Legislative Provisions and requested the Secretariat to review the various language versions, taking into consideration the suggestions made during the session of the Working Group.

16. The Working Group noted that it would have wished to have some more time available for completing its review of the draft. Yet it decided, in line with the hope expressed by the Commission at its twenty-ninth session,[2] to submit the draft Model Legislative Provisions to the Commission for consideration and completion at its thirtieth session. It was suggested that the Commission begin its considerations with article 14 and the following articles of the draft Model Legislative Provisions.

II. DRAFT UNCITRAL MODEL LEGISLATIVE PROVISIONS ON CROSS-BORDER INSOLVENCY

A. Consideration of draft provisions

Article 15. Relief upon application for recognition of a foreign proceeding

17. The text of the article, as considered by the Working Group, read as follows:

"(1) From the time of filing an application for recognition until the application is decided upon, the court may, under the conditions in article 17, grant any relief permitted under that article.

"(2) The court shall order the foreign representative to give such notice as would be required for requests for provisional relief in this State.

"(3) Such relief may not extend beyond the date that the application for recognition is decided upon, unless it is extended under article 17(1)(c)."

Paragraphs (1) and (2)

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[2] Official Records of the General Assembly, Fifty-first session, Supplement No. 17 (A/51/17), para. 237.

18. The view was expressed that article 15 should not refer to article 17 since a representative of a foreign non-main proceeding should not have access to all types of relief available under article 17 (see paras. 50-53 below). It was, however, considered that at the time of application for recognition it might not be clear whether the foreign proceeding was a main or a non-main proceeding and that, in any case, the court granting pre-recognition relief should be able to tailor the relief to the needs of the foreign representative. In addition, it was considered desirable for the Model Provisions to specify a minimum list of discretionary remedies that would be available in each State enacting the Model Provisions as not all States currently provided all kinds of relief provided in article 17. It was therefore thought necessary to keep the list of relief as broad and as flexible as possible, and the Working Group decided that the parallelism between the list of relief under articles 15 and 17 should be maintained. It was also decided that, instead of merely referring to "the conditions in article 17", those conditions should be spelled out in article 15. It was suggested that a representative of a foreign non-main proceeding should be able to obtain relief only insofar as it pertained to the assets covered by that proceeding, a suggestion that also applied to article 17 (see para. 53 below). A view was expressed that relief under article 15 should be limited to relief currently available under the law of the enacting State.

19. It was noted that "the court" in paragraphs (1) and (2) might be any court in the enacting State competent to issue provisional measures and not necessarily the court that, according to article 4, had jurisdiction relating to recognition of foreign proceedings and cooperation with foreign courts.

20. A suggestion was made to subject the issuance of relief under article 15 to any exceptions or limitations applicable under the law of the enacting State, in the same way as was provided in article 16(2) for relief granted under that article. However, the Working Group considered that relief under article 15 (as well as article 17) was discretionary and that there was, therefore, no need to make the issuance of the discretionary relief subject to exceptions and limitations contained in the law of the enacting State.

21. In that context it was stated that the laws of some States did not permit in situations envisaged in article 15 the issuance of all measures mentioned in article 17(1) (e.g., staying the commencement or continuation of individual actions, as provided in subparagraph (a)) and that for that reason article 15 might pose a difficulty for those States.

22. It was suggested that the measure granted under subparagraph (a) should be restricted to staying the execution of a court decision, but that a creditor should not be prevented from initiating or continuing an action to preserve a right. According to that view, a stay under the subparagraph might be in conflict with fundamental rights of each person to seek in courts the protection of its rights (see para. 54 below).

Paragraph (3)

23. According to one view, it should be provided that measures issued under article 15 were to terminate when the application for recognition was decided upon and that any measure which needed to be issued thereafter was a new measure. According to another view, which the Working Group adopted, it was useful to leave to the court a possibility to extend the relief granted upon application for recognition, so as to ensure that there was no hiatus between the provisional measure and the measure issued after recognition.

Article 16. Relief upon recognition of a foreign main proceeding

24. The text of the article, as considered by the Working Group, read as follows:

"(1) Upon recognition of a foreign main proceeding,[c]

(a) the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities shall be stayed; and

(b) the right to transfer, dispose with or encumber any assets of the debtor shall be suspended.

"(2) The scope of the stay and suspension referred to in paragraph (1) is subject to any exceptions or limitations applicable under *[insert names of laws of the enacting State relating to insolvency]*.[d]

"(3) No earlier than __ days after recognition of a foreign main proceeding, the court may permit the foreign representative to administer, realize and distribute assets of the debtor in the foreign proceeding. If a proceeding concerning the debtor under *[insert names of laws of the enacting State relating to insolvency]* has been opened, such permission may only be given after the completion of that proceeding."

General remarks

25. The Working Group considered the relationship between article 16 and the other provisions of chapter III of the draft Model Provisions. It was observed that article 16 dealt with effects that would mandatorily flow from the recognition of the foreign proceeding, while articles 15 and 17 dealt with relief that could be ordered by the court of the enacting State, at its discretion, and upon request by the foreign representative. It was also noted that, unlike articles 15 and 17, which, as currently drafted, encompassed both foreign main proceedings and foreign non-main proceedings, article 16 was intended to provide certain mandatory effects only to a foreign main proceeding, upon recognition in the enacting State. Having noted the particular nature of the provisions contained in article 16, as distinct from those provided in articles 15 and 17, the Working Group agreed that the title of article 16 should be amended and referred the matter to the drafting group.

26. It was suggested that article 16 should contain a provision that limited the mandatory effects of a foreign main proceeding so as not to go beyond the effects that such proceedings had in the originating State. The countervailing view, however, was that under such a rule it would not be possible for the court of the enacting State to determine which effects were to be given to a foreign proceeding in the enacting State without engaging in a possibly complex

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"[c] The enacting State may wish to consider the following alternative wording to replace the chapeau of article 16 (1):

"(1) Upon recognition of a foreign main proceeding, or upon application for recognition of a foreign main proceeding taking place in one of the States listed in annex X, ..."

"[d] The enacting State may wish to consider the following two alternatives with respect to paragraph (2):

"Alternative I (addition to paragraph (2)): If the foreign main proceeding is taking place in one of the States listed in annex X, the scope of the stay and suspension referred to in paragraph (1) is subject to any exceptions or limitations applicable under the law of the foreign main proceeding.

"Alternative II (replacement of paragraph (2)): (2) The scope of the stay and suspension referred to in paragraph (1) is subject to any exceptions or limitations applicable under the law of the foreign main proceeding."

analysis of foreign law. It was also stated that the enacting State would be concerned primarily with the effects given to a foreign proceeding in its own territory, rather than with the effects of that proceeding in the foreign jurisdiction where the proceeding originated.

27. It was noted that the provisions of article 16 had been based on the assumption that no local insolvency proceedings existed at the time the recognition of the foreign proceeding was sought. Concerns were voiced that article 16 did not adequately deal with situations where concurrent proceedings in respect of the same debtor existed in the enacting State and in the foreign jurisdiction. It was suggested that article 14 should include the existence of local proceedings among the grounds justifying the refusal of recognition to a foreign proceeding. Alternatively, article 16 should limit the effects of recognition to giving the foreign representative access to the local proceedings. Another view was that those concerns raised a question of coordination between local and foreign proceedings, and that the appropriate place for addressing them was in chapter V of the draft Model Provisions. (For a further discussion of concurrent proceedings, see paras.185-200 below.)

28. The view was expressed that article 16 should aim at the protection of all creditors, foreign and local, in essentially the same manner and should establish a parallel between the powers that could be exercised by a local and a foreign representative. It was proposed that article 16 should be redrafted to the effect that, upon recognition, the foreign representative would be given the same rights and prerogatives in respect of the assets of the debtor as were provided in local law to a local representative. In response it was said that article 16 was aimed at establishing a minimum catalogue of effects of foreign main proceedings, which would apply uniformly in all States that enacted the Model Provisions. That aim would not be achieved if the effects of the recognition varied from country to country depending upon the national law.

Paragraphs (1) and (2)

29. It was noted that article 16 contained provisions intended to protect the interests of all creditors by staying individual actions and suspending the transfer of assets of the debtor. As regards the scope of the stay of actions in paragraph (1) (a), it was also noted that article 16 was only intended to avoid dissipation of the debtor's assets that would result from individual actions against the assets of the debtors being allowed to run simultaneously to the foreign proceedings. Article 16 (1) (a) was not intended, however, to prevent the opening of a local collective proceeding. The Working Group was reminded that those provisions had been the object of extensive discussions in previous sessions of the Working Group, during which a consensus had arisen as to the need for the measures listed therein (A/CN.9/433, paras. 115-126).

30. The question was asked whether the stay of individual actions applied only to proceedings that had been opened pursuant to a definite decision, or whether it applied also in case of proceedings opened on an interim basis. In particular, there was a concern that the mandatory effect in article 16 might not be appropriate in the case of a foreign proceeding that had been commenced only on an interim basis. In response it was noted that the stay of individual actions was to apply in both situations, since both types of proceedings were encompassed by the definition of foreign proceedings contained in article 2 (a).

31. It was observed that article 16 did not address the question whether national rules on the limitation period for the commencement of individual actions would still apply to actions stayed pursuant to paragraph (2) (a). In the absence of such a rule, and with a view to avoiding adverse effects to creditors affected by the stay under paragraph (1) (a), it was suggested that an additional paragraph should be added to article 16 to authorize the commencement of individual actions to the extent that it was necessary to preserve claims against the debtor.

32. It was suggested that paragraph (1) (b) should expressly refer to the suspension of the "debtor's" right to transfer its assets, so as to make it clear that the provisions did not affect the rights that certain categories of secured

creditors, such as mortgagees, might have under some legal systems to realize their rights in those assets. For that purpose, it was suggested to add the words "of the debtor" between the words "the right" and the words "to transfer" in paragraph (1) (b).

33. Reservations were expressed with regard to the proposed amendment, which was felt to weaken the scope of the suspension under paragraph (1) (b). It was noted that paragraph (2) already made the stay and the suspension under paragraph (1) (a) and (b) subject to exceptions and limitations provided in national law. For those legal systems which exempted certain secured creditors from the suspension of transfers of assets, or which did not stay individual actions commenced by certain categories of creditors, it would be possible to maintain those exceptions under the authorization provided in paragraph (2). It was suggested that examples of those instances could be given in the guide to enactment, for the purpose of explaining the possible scope of application of paragraph (2).

34. The concern was expressed that an unqualified suspension of transfers of assets, as currently provided in paragraph (1) (b), might paralyse all transactions of the debtor in the enacting State, thus forcing the debtor's establishment in that State into insolvency. Such a result would not be in the interest of the creditors, who might be better served by ensuring the continuation of the activities of such establishment. Therefore, it was suggested that the suspension of transfers of assets should not apply to transfers that occurred in the ordinary course of business, so as not to jeopardize the financial viability of the debtor's establishment in the enacting State.

35. In response it was noted that the question of transactions that occurred in the ordinary course of business had been discussed by the Working Group in previous sessions (A/CN.9/422, paras. 108 and 109, and A/CN.9/433, paras. 124 and 125). At its twentieth session, the Working Group had agreed that it would not be feasible to attempt to address that question in the draft Model Legislative Provisions and that the matter should be left to be treated as an exception or limitation that might be made to the scope of the suspension under paragraph (2) (A/CN.9/433, para. 125).

36. The Working Group considered the question of possible sanctions that might apply to acts performed in defiance of the suspension of transfers of assets provided under article 16 (1) (b). It was pointed out that the consequences of the violation of a statutory suspension of transfers varied greatly in different legal systems. Possible sanctions might include criminal sanctions, penalties and fines. In some systems, the acts themselves might be regarded as void or might be capable of being set aside pursuant to a court order.

37. It was noted, however, that these questions involved many complex issues which did not lend themselves to being addressed within the framework of the draft Model Provisions, such as the rights of third parties who acquired assets of the debtor. It was pointed out that, if included in the text, a provision on sanctions for the violation of the suspension of transfers of assets would need to be supplemented with exceptions, as provided in a number of legal systems, to protect the interests of third parties who in good faith acquired assets from an insolvent debtor without knowledge of the suspension of transfer of assets. Thus, it was generally felt that it would not be feasible to deal in the draft Model Provisions with the sanctions that might apply to the violation of article 16 (1) (b). It was proposed that the guide to enactment should mention the possible different approaches taken by national laws, pointing out that an essential purpose of those sanctions was to facilitate recovery for the insolvency proceeding of any assets unduly transferred by the debtor and that, for that purpose, the avoidance of such transactions was more effective than the imposition of criminal or administrative sanctions on the debtor.

Paragraph (3)

38. It was observed that, unlike paragraph (1), which dealt with mandatory effects of the recognition of the foreign main proceeding, paragraph (3) dealt with measures that could be granted at the discretion of the court

recognizing the foreign proceeding, under the conditions provided therein. Thus, it was proposed that the rule contained in paragraph (3) would be more appropriately placed in article 17.

39. Various interventions were made concerning the question of ensuring adequate protection of the interests of local creditors within the context of paragraph (3). The view was expressed that, as currently drafted, paragraph (3) did not afford adequate protection to the interests of local creditors, and might induce local creditors to commence a local proceeding, so as to preclude a turnover of the assets to the foreign representative for realization and distribution in the foreign proceeding, or for the purpose of securing the privileges enjoyed by their respective classes of claims under the insolvency laws of the enacting State.

40. The Working Group considered the importance of elaborating provisions that ensured adequate protection of the interests of all creditors, including creditors in the enacting State. However, the Working Group was urged to consider such protective measures in a manner that ensured the equality of creditors, rather than establishing a preferential treatment of local creditors to the detriment of foreign creditors.

41. As regards the minimum waiting period in paragraph (3) for the permission to turn over assets to the foreign representative, the view was expressed that such a period was necessary to protect the interests of local creditors, by affording them the opportunity to file claims or to request the opening of a local insolvency proceeding prior to the turnover of assets to the foreign representative.

42. Another view, however, was that the minimum period in paragraph (3) created more problems than it solved. It was pointed out that paragraph (1) (a) suspended the debtor's right to transfer or encumber any of its assets upon recognition of a foreign main proceeding, but that the recognition did not, in and of itself, place the debtor's assets and affairs under the control and the supervision of the court of the enacting State. In the circumstances, the concern was expressed that during the period contemplated in paragraph (3) uncertainties would arise as to who was responsible for the management of the debtor's assets in the enacting State. It was therefore suggested that no minimum period should be provided in paragraph (3).

43. The view was also expressed that establishing a delay for the turnover of assets to the foreign representative, as provided in paragraph (3), did not constitute an effective measure to protect the interests of local creditors. It was felt that the protection of those interests might be better addressed by requiring that the creditors be given adequate notice of the recognition prior to the turnover of assets. A suggestion was made that a separate provision should deal with such notice requirements. Having considered those views, the Working Group agreed to delete the delay provided in paragraph (3).

44. For the purpose of clarifying the scope of application of paragraph (3), it was suggested that the words "located in this State" should be added after the words "the assets".

45. Questions were raised as to the purpose of the second sentence of paragraph (3), whereby the permission for the turnover of assets might only be given after the completion of any pending local proceeding. The view was expressed that such a rule, which was intended to protect the interests of local creditors, was excessively rigid. The interests of local creditors and of the creditors as a whole were not necessarily fostered by promoting the opening of parallel proceedings. Also, in some cases it might be in the interest of all creditors, local and foreign, to assemble all assets for realization and distribution in one single proceeding. It was instead suggested that it might be sufficient to provide that, in order to grant the turnover of assets, the court of the enacting State must be satisfied that the interests of local creditors were adequately protected. It was pointed out in that connection that a number of safeguards had been inserted in article 19 and that the cooperation mechanisms provided in chapter V could also play a role in protecting the collective interests of the creditors, foreign or local. Those provisions could be developed further so as to address the concerns expressed in the Working Group.

46. After consideration of the various views expressed, the Working Group found the substance of article 16 to be generally acceptable and referred it to the drafting group to prepare a revised draft that reflected the above discussion. (For the subsequent decision to include the substance of paragraph (3) in article 17, see para. 59 below).

Footnote "c"

47. It was felt that the option provided in footnote "c" did not represent a realistic alternative. It was thus agreed to delete it.

Footnote "d"

48. The Working Group noted that the two options provided under footnote "d" made it possible to subject the effects of paragraph (1) (a) or (b) to exceptions and limitations provided in the law of the foreign main proceeding either in addition to, or in lieu of, the exceptions and limitations provided under the laws of the enacting State. It was generally felt that both options should be deleted, as they rendered difficult the application of article 16, by requiring the court of the enacting State to examine possibly complex rules of foreign law. Also, both options might weaken the scope of the stay and the suspension provided in paragraph (1) by authorizing the importation of restrictions not otherwise provided in the laws of the enacting State.

Article 17. Relief upon recognition of a foreign main or non-main proceeding

49. The text of the article, as considered by the Working Group, read as follows:

"(1) Upon recognition of a foreign main or non-main proceeding, where necessary to protect the assets of the debtor or the interests of creditors, the court may, upon the request of the foreign representative, grant any appropriate relief including:

"(a) staying the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they were not stayed under article 16 (1) (a);

"(b) suspending the transfer, disposal or encumbrance of any assets of the debtor, to the extent they were not suspended under article 16 (1) (b);

"(c) extending relief granted under article 15;

"(d) compelling testimony or the delivery of information concerning the assets and liabilities of the debtor;

"(e) entrusting the preservation and management of the assets of the debtor to the foreign representative or another person designated by the court;

"(f) granting other relief that may be available under the laws of this State."[e]

"(2) The court may refuse to grant relief in respect of a foreign non-main proceeding if such relief would interfere with the administration of a foreign main proceeding."

General consideration

50. Interventions were made favouring the establishment of a hierarchy between foreign representatives in the sense that a representative of a foreign main proceeding should have precedence over a representative of a foreign non-main proceeding and that, if need be, precedence should be established also among several foreign non-main representatives. Furthermore, it was said that a representative of a non-main proceeding (whose authority was typically restricted to the assets in the State where the non-main proceeding had been opened) should be able to obtain relief only insofar as it pertained to the assets covered by that proceeding. Thus, it was argued, the representative of a non-main proceeding should not be able to obtain relief covered by subparagraphs (a) and (b) (stay of actions and suspension of transfers of assets). Such representative would in normal circumstances only require information relating to the assets covered by the foreign non-main proceeding or would seek measures aimed at repatriating assets that were improperly removed from the State of the non-main proceeding.

51. In view of the above considerations, one of the suggestions made was that the article should envisage a restricted catalogue of relief for non-main proceedings as compared to main proceedings; in particular, the relief under paragraph (1) (a) and (b) should not be available to a representative of a foreign non-main proceeding. Another suggestion was that the article should express only the purpose of the granting of relief, without giving a list of relief available to different types of foreign representatives. A further suggestion was that the granting of relief under article 17 should be made subject to the requirements, limits and procedures of the law of the enacting State and that that idea should be expressed by adding at appropriate places words such as "under the conditions of the law of this State".

52. The last suggestion was objected to since it was implicit, by virtue of the discretionary nature of the relief under article 17, that the court would, in deciding whether to give relief and how broad should the relief be, have regard to its own law. Also, such a restriction was unnecessary in view of article 19, which permitted modification and termination of relief. In addition, the list of possible relief enumerated in subparagraphs (a) to (e) was a minimum list and the court should not be prevented from granting relief if that was found to be useful and fair. Furthermore, distinguishing relief on the basis of a distinction between main and non-main proceedings (or between more than one non-main proceeding) was not appropriate since the distinction was based more on the scope than on the quality of proceedings.

53. After exhaustive consideration, the Working Group reached the consensus that, indeed, the interests and the authority of a representative of a foreign non-main proceeding were typically narrower than the interests and the authority of a representative of a foreign main proceeding (who normally sought to gain control of all assets of the insolvent debtor). However, instead of differentiating the list of relief available to those representatives, it was considered preferable to express those differences by including a wording in the article that would make it clear that, in granting relief under article 17 to a representative of a foreign non-main proceeding, the court had to be satisfied

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"[e] The enacting State may wish to consider the following alternative wording to replace subparagraph (f):

"(f) granting other relief that may be available under the laws of this State or the laws of the State where the foreign proceeding is taking place."

that the relief related to assets falling under the authority of that representative or that it concerned information required in the foreign non-main proceeding.

Subparagraph (a)

54. It was suggested that the measure granted under subparagraph (a) should not prevent a creditor from initiating an action to preserve a right and that the stay should be restricted to the enforcement of rights. It was also suggested that individual actions commenced before recognition should be allowed to continue. According to that view, a stay under the subparagraph might be in conflict with the fundamental right of each person to seek in courts the protection of its rights. That fundamental right, it was said, should be safeguarded in the context of article 17 as well as in the context of "automatic" stay under article 16 (see para. 22 above). The Working Group, however, adopted the view that the discretionary nature of the measure under the subparagraph, as well as the possibility to modify the measure under article 19, provided ample room to give effect to those concerns. Furthermore, the relief might be necessary to provide temporary respite to the foreign representative to organize the affairs of the debtor and not be distracted by having to participate in possibly numerous actions against the debtor.

Subparagraph (d)

55. It was agreed to add in subparagraph (d) a reference to information about the debtor's "affairs" or "business dealings" since access to such information, which was not expressly covered by the current wording, might be essential for carrying out the tasks for which the foreign representative was given authority.

Subparagraph (e)

56. It was agreed to permit expressly the court to sell the debtor's assets, a relief that was only implicitly covered by subparagraph (e). Such realization of assets might be necessary, for instance, as part of the continuing business activities of the debtor, or to pay the wages of employees.

Subparagraph (f)

57. Subparagraph (f) was considered by some to be too broad and open-ended in that it did not give an indication or limitation as to the kinds of other relief that could be granted under the article. One proposal was to make the list more focused by adding words such as "relating to administration, realization or distribution of assets"; another proposal was to broaden the list of relief enumerated in paragraph (1), which would make it possible to delete subparagraph (f). A further proposal was to restrict the relief to that available to the insolvency administrator in the enacting State. The Working Group adopted that last proposal.

Existence of local insolvency proceedings

58. It was considered that a pending insolvency proceeding in the enacting State should be an obstacle to granting relief to the foreign representative under article 17. In such a case, the foreign representative should be referred to the participation in the local proceeding, to requesting relief therein and to any assistance that might be available under article 21 (on cross-border judicial cooperation). It was proposed that the Model Provisions should expressly provide that relief of the types enumerated in article 17 should be available to the foreign representative in the context of the insolvency proceeding in the enacting State. The Working Group deferred the discussion of how to treat such concurrent proceedings to the consideration of chapter V (see paras. 185-200 below).

"Turnover" of assets to the foreign representative

59. The Working Group recalled its considerations regarding article 16 (3), which empowered the court to permit the foreign representative to realize and distribute assets located in the enacting State (see paras. 38-46 above). It was agreed that that type of relief was not automatic and that for that reason it should be included in article 17. The drafting group was entrusted with preparing a draft paragraph that expressed the idea that, before entrusting the foreign representative (or another person) with the distribution of assets, the court had to be satisfied that the interests of creditors in the enacting State were adequately protected.

Paragraph (2)

60. In view of the decision to provide a restrictive guideline for the granting of relief to foreign non-main proceedings (para. 53 above), the provision (currently referring to avoiding interference with a foreign main proceeding) was considered unnecessary.

61. It was suggested that, in granting relief under article 17, the court should also be admonished to prevent interference or disturbance of a proceeding in the enacting State. That point, however, was left to be taken into account in the discussion of concurrent proceedings under chapter V (see paras. 185-200 below).

"Paulian actions"

62. The Working Group considered the right of the foreign representative to initiate actions to reverse or render unenforceable legal acts detrimental to creditors (sometimes referred to as "Paulian actions"), on the basis of a new draft article suggested by the Secretariat (A/CN.9/WG.V/WP.48, note 2 to draft article 17) along the following lines:

> "A foreign representative has the right to initiate, under the conditions of the law of this State, an action to reverse or render unenforceable legal acts detrimental to all creditors."

63. Varying views were expressed as to the desirability of including a rule such as the one contained in the above-quoted provision. According to one view, the issue in question was of great complexity and would not lend itself to a harmonized solution within the framework of the draft Model Provisions. The prevailing view, however, was that a provision on the subject was needed in the draft Model Provisions. The right to commence actions to reverse or render unenforceable legal acts detrimental to all creditors was essential to protect the integrity of the assets of the debtor, in the interest of all creditors. Such right should not be denied to a foreign representative, as might be implied by the absence of an express provision on the subject. It was understood that the provision was intended to relate to the conferring of standing to bring actions and not to the creation of substantive rights.

64. The question was asked whether the phrase "under the conditions of the law of this State" referred to procedural rules of the enacting State governing those actions, or to the substantive law applicable to those actions. The view was expressed that the question of the applicable law to determine the requirements and other substantive rules for the commencement of those actions should be left for the rules on the conflict of laws of the enacting State.

65. The meaning of the words "reverse or render unenforceable" was found to be unclear and it was suggested to use instead the words "avoid or otherwise render ineffective", which were words used technically in a number of legal systems.

66. Regarding the scope of those actions, it was noted that in some legal systems the right to commence such actions might be provided in general rules and principles of law, such as the Civil Code, or might derive from specific statutory provisions of insolvency law. In the first case any affected creditor had the right to initiate those actions, while in the latter case that right was usually reserved in principle to the insolvency administrator. It was suggested

that the additional provision should refer only to actions that were available, according to the law of the enacting State, to the local insolvency administrator in the context of insolvency proceedings in the enacting State.

Article 18. Notice of recognition and relief granted upon recognition

67. The text of the article, as considered by the Working Group, read as follows:

> "[The foreign representative shall] [When the court recognizes a foreign main or non-main proceeding pursuant to article 13(3), it shall order the foreign representative to] give notice of the recognition, of the stay and suspension as provided in article 16(1) and of any relief granted under article 17(1) within __ days to all known creditors that have an address in this State. Such notice shall be given in the form required by the law of this State. [The obligation] [The order] to give notice does not suspend the effectiveness of the recognition or the relief."

68. The need for a specific provision on notice was questioned, and it was suggested that it might be sufficient to provide, similarly to articles 21 and 22 of the European Union Convention on Insolvency Proceedings, that the foreign representative had to comply with local publication procedures. In response it was noted that not all legal systems required notice of recognition of foreign proceedings and other court measures that followed recognition and that, therefore, a specific provision on the subject was necessary.

69. Reservations were expressed with regard to the scope of the notice requirements provided in article 18, which were found to be excessive. Various interventions were made in favour of limiting those requirements to providing notice of the recognition of the foreign proceeding and of the effects of that recognition, if required by local law. If local law also required notice to be given of any relief granted under article 17, or where the court found such notice to be necessary, the provision of such notice might still be ordered by the court, as a condition for granting the relief, pursuant to article 19(3).

70. Questions were asked as to who should bear the cost of the notice required to be given under article 18. In response it was said that that question should be left for the procedural rules of the enacting State and that nothing in article 18 prevented the court of the enacting State from ruling that the foreign representative should bear such costs.

71. The meaning of the last sentence of article 18 was found to be unclear and it was proposed to delete the sentence. In reply it was said that the last sentence of article 18 had been suggested so as to make it clear that the mandatory effects of the recognition, as well as any relief granted by the court under article 17, would be immediately operative and should not await the provision of notice to creditors and other interested parties under article 18. However, if article 18 was to be limited to requiring notice of the recognition, that sentence might no longer be needed.

Article 19. Protection of creditors and the debtor

72. The text of the article, as considered by the Working Group, read as follows:

> "(1) In granting or denying relief under [articles 15, 16 or 17] [this Law], the court must be satisfied that creditors collectively and the debtor are protected against undue prejudice and will be given a fair opportunity to assert their claims and defences.

"(2) Upon request of a person or entity affected by relief under articles 15, 16 or 17, the [competent] court may [deny,] modify or terminate such relief.

"(3) The court granting relief to the foreign representative may subject such relief to conditions it considers appropriate."

Paragraph (1)

73. Various objections were raised to the reference made to article 16 in paragraph (1). It was noted that article 16 dealt with mandatory effects of the recognition of a foreign main proceeding, and not with relief measures granted at the discretion of the court. It was noted that, as currently drafted, the provision expanded the discretion of the court of the enacting State in a manner that might not be acceptable to a number of legal systems and would not be conducive to greater legal certainty, which was one of the purposes of the draft Model Provisions.

74. Reservations were voiced with regard to the use in paragraph (1) of the words "undue prejudice", which were found to be of difficult interpretation in a number of legal systems. It was proposed that paragraph (1) should instead require the court of the enacting State to take into account the interests of all creditors, the debtor and other interested parties when granting relief under articles 15 and 17. In that connection, it was suggested that paragraph (1) should expressly refer to the protection of the interests of local creditors. One way of achieving that result might be to provide that the opening of a local proceeding would preclude granting relief under article 15 or 17 or terminate any relief previously granted by the court.

75. In response to that suggestion it was noted that such a provision would in fact prompt the opening of a local proceeding, a result which might not always be in the interests of all creditors, including local creditors. Besides, such a rule might require that the draft Model Provisions include a definition of local creditors, which would be difficult to formulate. As the purpose of article 19 was to ensure the protection of the interests of all creditors, without favouring any specific category, it was suggested that the proposed amendment should not be adopted.

Paragraph (2)

76. Objections were raised with regard to the possibility that the court of the enacting State might modify or terminate the mandatory effects of the recognition of a foreign main proceeding under article 16. Such a provision was found to be appropriate only in respect of discretionary relief granted under articles 15 and 17. General or ad hoc exceptions to article 16 should be dealt with within the context of that provision.

77. In response it was said that paragraph (2) was intended to provide persons that might be adversely affected by the stay or the suspension under article 16 (1) with an opportunity to be heard by the court of the enacting State. Such a safeguard was needed in the draft Model Provisions, so as to enable the court of the enacting State to deal with exceptional hardship situations, particularly in jurisdictions where no rule similar to article 16 (1) was in place. Furthermore, even in legal systems where the opening of insolvency proceedings produced the effects listed in article 16 (1), the courts were sometimes authorized to make individual exceptions upon request by the interested parties, under conditions prescribed by local law.

Paragraph (3)

78. It was suggested that paragraph (3) should be placed immediately after paragraph (1), so as to make it clear that the conditions referred to therein related to discretionary relief provided under articles 15 and 17, and not to modification or termination of relief under paragraph (2).

Article 20. Intervention by a foreign representative in actions in this State

79. The text of the article, as considered by the Working Group, read as follows:

"Upon recognition of a foreign proceeding, the foreign representative may intervene in actions in which the debtor is a [party][claimant or defendant] under the conditions of the law of this State."

80. It was said that, from the viewpoint of some national laws, the word "intervene" in the context of article 20 was unclear. In reply, it was stated that the word as used in the article did not present any difficulty of interpretation for other legal systems. The understanding was expressed that the purpose of the provision was to give the foreign representative standing to appear in court and to make representations in individual actions by the debtor against a third party or by a third party against the debtor. It was pointed out that many if not all national procedural laws contemplated cases where a party (the foreign representative in the current provision) who demonstrated a legal interest in the outcome of a dispute between two other parties was permitted by the court deciding the dispute to be heard in the proceedings. National procedural systems referred to such situations by different expressions, among which the expression "intervention" or similar expressions were frequent.

81. However, the view was also expressed that, for those legal systems where the words "to intervene" were not well understood, those words might be given a different interpretation, and in particular that they might carry the meaning that the foreign representative might substitute for the debtor in judicial actions. In response, it was emphasized that the words "to intervene", as used in article 20, did not mean "to substitute".

82. After consideration of the different views expressed, the Working Group agreed to retain the words "to intervene" and to include in the guide to enactment an explanation indicating that, if the enacting State used another expression for that concept, the use of such other expression in enacting article 20 would be appropriate.

83. With a view to clarifying the relation between articles 16 and 20, it was suggested that article 20 should limit the foreign representative's right to intervene in actions that had not been stayed under article 16(1). The suggested clarification was not adopted by the Working Group since it was considered self-evident.

84. It was also suggested that the right to intervene should be available only to the representative of a foreign main proceeding. The prevailing view, however, was that also the representative of a foreign non-main proceeding could have a legitimate interest in the outcome of a debtor's dispute between the debtor and a third party and that the provision should not exclude that possibility.

CHAPTER IV. COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

Article 21. Authorization of cooperation and direct communication with foreign courts and foreign representatives

85. The text of the article, as considered by the Working Group, read as follows:

"(1) In matters referred to in article 1, courts of this State shall cooperate to the maximum extent possible with foreign courts and foreign representatives. The court is permitted to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

"(2) In matters referred to in article 1, a *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* shall, within its authority, cooperate to the maximum extent possible with foreign courts and foreign representatives. The *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* is permitted, within its authority, to communicate directly with foreign courts or foreign representatives.

"(3) Cooperation may be implemented by any appropriate means, including:

"(a) appointment of a person to act at the direction of the court;

"(b) communication of information by any means deemed appropriate by the court;

"(c) coordination of the administration and supervision of the debtor's assets and affairs;

"(d) approval or implementation by courts of arrangements concerning the coordination of proceedings;

"(e) *[the enacting State may wish to list additional forms or examples of cooperation]*."

General consideration

86. Statements were made that judicial cooperation in general, including cooperation in insolvency matters, was governed by bilateral or multilateral treaties, which typically provided for cooperation based on reciprocity. For some States it was doubtful whether a workable framework for judicial cooperation could be established exclusively by way of a national statute, in particular since it was difficult to incorporate in it the concept of reciprocity. It was mentioned that, outside the framework of a treaty, a possible way of assuring a form of reciprocity was for a State to use the "annex X States" approach, a technique, also envisaged in footnotes "c" and "d" to article 16 (see para. 24 above), according to which cooperation was promised only with respect to courts from States that were listed in an annex to the national law governing cooperation.

87. The widely prevailing view, however, was that a provision such as the one contained in article 21 was useful since many States considered themselves in a position to provide in a national statute for a meaningful cross-border judicial cooperation, including cooperation in insolvency matters. To the extent such cooperation was based on principles of comity among nations, the enactment of the Model Provisions, including its article 21, offered an opportunity for making that principle more concrete and adapted to the particular circumstances of cross-border insolvencies.

88. In that connection it was recalled that the conclusion by the Working Group at its previous session was that the adoption of the Model Legislative Provisions by the Commission "would not exclude the possibility of undertaking work towards model treaty provisions or a convention on judicial cooperation in cross-border insolvency, if the Commission at a later stage so decided" (A/CN.9/433, para. 20).

89. The Working Group, having heard those views, proceeded to discuss article 21, recalled its earlier view that reciprocity was a concept to which no single solution could be easily provided (ibid., para. 19) and decided that the concept should not be addressed in the Model Provisions.

Paragraphs (1) and (2)

90. While it was accepted that the article should cover cooperation between courts as well as that between insolvency administrators, it was agreed that paragraphs (1) and (2) should make it clear that an insolvency administrator acted under the overall supervision of the competent court, the purpose of which was to ensure fairness, protection of creditor's interests and protection of confidential information. It was stressed, however, that any modification of the provision should not inadvertently suggest that ad hoc authorization would be needed for each act by the administrator, which would be contrary to practice.

91. In order to implement those considerations, it was suggested to state in paragraph (1) that the competent court in the enacting State should cooperate with foreign courts "either directly or through" an insolvency administrator. In addition, it was proposed that, in describing the limits of the administrator's authority in paragraph (2), the expression "within its authority" should be replaced by words such as "in the exercise of its functions and subject to supervision of the court".

Paragraph (3)

92. It was suggested to include in subparagraph (b) or at another appropriate place in the article a provision to the effect that cooperation and communication of information had to be "subject to the rules restricting the communication of information" (a proviso modelled on article 31 (1) of the European Union Convention on Insolvency Proceedings). The opposing view was that the duty to observe the confidentiality of information was one of various obligations to which cooperation was subject. Also, since the Model Provisions were not a self-contained set of rules, those obligations applied without being mentioned in the article. Thus it was preferable not to deal with those obligations in the article.

93. In subparagraph (c), the Working Group did not adopt the suggestion to split the provision into two, one dealing with the administration of the proceedings and the other with supervision of the proceedings. An observation was made that the provision of subparagraph (c) was different from the others in that it expressed the result to be achieved rather than the means to achieve it.

94. The Working Group decided to replace in subparagraph (d) the word "arrangement", considered to be unclear, with the word "agreement" or a similar term. A suggestion was made to include at the end of subparagraph (d) words along the lines of "realization of assets, payment of creditors' claims and other aspects of proceedings". Those words were said to be necessary to make it clear that, in order to achieve the purpose of article 23, it was necessary to coordinate the amounts paid to creditors and the timing of payments. No support was expressed for that suggestion.

Concurrent proceedings

95. A proposal was made to make express reference in paragraph (3) to instances of concurrent proceedings by including a new subparagraph (d bis) that might be along the lines of "coordination of multiple proceedings regarding the same debtor" or "coordination of main, non-main and local proceedings in respect of the same debtor". While support was expressed as to the substance of the proposal, it was said that the Model Provisions should treat more exhaustively various aspects of concurrent proceedings. The Working Group agreed to consider those matters in the context of its discussion of chapter V (see paras. 185-200 below). In addition, it was said that it would be desirable to include in article 21 criteria to guide the court in cooperating with foreign courts and representatives.

Article 23. Rate of payment of creditors

96. The text of the article, as presented to the Working Group, read as follows:

"Without prejudice to [secured claims] [rights in rem], a creditor who has received part payment in respect of its claim in an insolvency proceeding opened in another State may not receive a payment for the same claim in a proceeding opened in this State under *[... insert names of laws of the enacting State relating to insolvency]* with regard to the same debtor in this State, so long as the payment to the other creditors of the same class for their claims in the proceeding opened in this State is proportionately less than the payment the creditor has already received."

97. For lack of time, the Working Group did not discuss article 23 at the current session.

98. For further discussions relating to concurrent proceedings, see paragraphs 185-200 below.

PREAMBLE

99. The text of the preamble, as considered by the Working Group, read as follows:

"The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

"(a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;

"(b) greater legal certainty for trade and investment;

"(c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested parties;

"(d) protection and maximization of the value of the debtor's assets; and

"(e) facilitation of the rescue of financially troubled businesses [, thereby protecting investment and preserving employment]."

100. The substance of the preamble was approved, subject to reference in subparagraph (c) also to the debtor as a party whose interests were to be protected and subject to retention of the words that were currently between the square brackets in subparagraph (e).

Chapter I. GENERAL PROVISIONS

Article 1. Scope of application

101. The text of the article, as considered by the Working Group, read as follows:

"This [Law] [Section] applies where:

"(a) assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or

"(b) assistance is sought in a foreign State in connection with a proceeding in this State under *[insert names of laws of the enacting State relating to insolvency]*; or

"(c) a foreign proceeding and a proceeding in this State under *[insert names of laws of the enacting State relating to insolvency]* in respect of the same debtor are taking place concurrently; or

"(d) creditors or other interested parties in a foreign State have an interest in requesting the opening of or participating in a proceeding in this State under *[insert names of laws of the enacting State relating to insolvency]*."

General considerations

102. Objections were voiced to retaining article 1 in its current form. It was noted that the article did not create any rights or obligations and merely listed situations regulated elsewhere in the draft Model Provisions. It was pointed out that, although intended to perform an explanatory function only, article 1 might be interpreted as limiting the scope of the remaining articles of the draft Model Provisions. Furthermore, it was considered to be unusual for a legislative text to define its own scope of application by providing examples of situations covered by its provisions. It was suggested that if an explanatory provision was needed at all in article 1, it would be preferable to formulate it in general terms, along the following lines: "This [Law] [Section] applies to situations of cross-border insolvency and related proceedings dealt with in the following articles." In response it was proposed to retain the current text of article 1, as some States might find it useful to provide such explanation of the scope of the draft Model Provisions. Those States that did not find the article necessary could eliminate it when implementing the Model Provisions.

103. It was suggested that the guide to enactment should explain the meaning of the word "assistance" as used in subparagraphs (a) and (b).

104. It was proposed to add a new subparagraph that would refer to the situation where creditors or other interested parties in the enacting State had an interest in requesting the opening of an insolvency proceeding in a foreign State or an interest in participating in such a proceeding. It was argued that, for the sake of completeness, that situation should be covered in article 1, since subparagraph (d) covered the "mirror" situation (viewed from the perspective of foreign creditors or other foreign interested parties).

105. It was suggested to include in subparagraph (b) the subjects who might seek assistance in a foreign State, so as to align the style of the subparagraph with subparagraph (a). Another suggestion was to delete subparagraph (b) since the rights of the creditors in the enacting State were dealt with in other bodies of law such as contract law and since it was not the function of the draft Model Provisions to touch upon or encourage the pursuit of those rights abroad. A further suggestion was that another situation possibly to be covered in the article was where, after the conclusion of the insolvency proceeding in a foreign State, assets pertaining to the debtor emerged in the enacting State and the foreign creditors sought to seize those assets. It was also proposed to delete subparagraph (d) since it either overlapped with subparagraph (a) or highlighted a principle that was already contained in national laws.

106. As the proposals for modification of the article did not attract sufficient support, the Working Group approved the substance of article 1.

Article 2. Definitions and rules of interpretation

107. The text of the article, as considered by the Working Group, read as follows:

"For the purposes of this Law:

"(a) 'foreign proceeding' means a collective judicial or administrative proceeding, including a proceeding opened on an interim basis, pursuant to a law relating to insolvency in a foreign State in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

"(b) 'foreign main proceeding' means a proceeding taking place in the State where the debtor has the centre of its main interests;

"(c) 'foreign non-main proceeding' means a proceeding taking place in the State where the debtor has an establishment within the meaning of subparagraph (g) of this article;

"(d) [(c)] 'opening of a foreign proceeding' is deemed to have taken place when the order opening the proceeding becomes effective, whether or not [final] [subject to appeal];]

"(e) [(b)] 'foreign representative' means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

"(f) [(d)] 'court' in reference to a foreign court means a judicial or other authority competent to carry out functions referred to in this Law;

"(g) [(e)] 'establishment' means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods."

General remarks

108. A suggestion was made to place article 2 before article 1, since the latter provision employed some of the terms defined in article 2. In response it was pointed out that in some legal systems a provision on the scope of application of a legislative text usually appeared before any other provision. In any event, enacting States remained free to reverse the order of articles 1 and 2.

109. It was pointed out that the word "insolvency", which was given a broad meaning in the draft Model Provisions, had a narrower connotation in some languages. It was thus suggested that a definition of "insolvency" should be included in article 2 or, alternatively, that a different word should be used in those languages. The Working Group felt that it would not be feasible to attempt to formulate a definition of "insolvency" and requested the secretariat to review the language versions of the draft Model Provisions so as to find appropriate wording in respect of those languages in which difficulties had been identified.

Subparagraph (a)

110. In response to questions concerning the need for a reference to interim proceedings in subparagraph (a), the Working Group reiterated its agreement that reference to those proceedings should be made in paragraph (a) (A/CN.9/433, paras. 38 and 39). It was agreed that the words "interim proceedings" should substitute for the words "proceeding opened on an interim basis".

111. It was suggested that the words "affairs of the debtor" were not sufficiently clear and that "affairs" should be qualified as being of a "financial" or "commercial" nature. In response it was noted that the adjective "financial" had a narrow meaning in a number of legal systems, as related to transactions with currency, securities or stocks in the financial market. Also the adjective "commercial", which was used in some legal systems to refer to transactions covered by a particular body of law sometimes referred to as "commercial law", might be interpreted as excluding certain categories of debtors whose transactions were not qualified as "commercial affairs" in those legal systems.

Subparagraph (d)

112. Noting that the draft Model Provisions also covered situations where the proceedings were commenced pursuant to a corporate act from which followed consequences determined by the law (ibid., para. 39), the Working Group referred subparagraph (d) to the drafting group to provide alternative language to the words "order opening the proceeding". (Subsequently, the drafting group suggested deletion of the subparagraph.)

Subparagraph (g)

113. In response to questions concerning the need for retaining the definition of "establishment" contained in subparagraph (g), it was recalled that the Working Group had previously agreed on the need for providing such definition (ibid., para. 41). One suggestion made to clarify subparagraph (g) was to delete the words "with human means and goods", as they might be interpreted as excluding certain enterprises such as those operating in a strictly electronic environment. Another suggestion was to define "establishment" as a place of operations other than the centre of the debtor's main interests. After consideration of those suggestions, the Working Group agreed on retaining the definition contained in subparagraph (g), which followed a similar definition provided in article 2(h) of the European Union Convention on Insolvency Proceedings.

Article 3. International obligations of this State

114. The text of the article, as considered by the Working Group, read as follows:

> "To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail."

115. It was observed that cooperation between States, including cooperation between judicial bodies, was frequently addressed in bilateral or multilateral conventions and other forms of agreements binding States, such as diplomatic protocols or exchanges of diplomatic notes. It was also observed that, for example, article 13(6), which dispensed with the requirement of legalization of documents, or article 21, which allowed courts to communicate directly, might be overridden by international agreements that dealt with the legalization of documents or with communication between courts. It was suggested that, in order to avoid an unnecessarily broad effect of international agreements, it might be useful to provide expressly that the Model Provisions were overridden only where the treaty or convention in question regulated matters covered by the Model Provisions; another proposed solution was to provide that the Model Provisions did not alter international obligations of the enacting State in matters of cross-border insolvency.

116. While some support was expressed for modifying the article as suggested, one view was that the article should be deleted because it either stated what applied anyway or because it was not for a (model) national statute to deal with matters that concerned the hierarchy among legislative acts, an issue that had constitutional implications. Some proponents of that view suggested that the issue be explained in the guide to enactment.

117. Strong support was expressed for the deletion of the article. Nevertheless, in view of its usefulness for a number of States, it was decided to keep it for the time being.

Article 4. Competent [court] [authority][a]

118. The text of the article, as considered by the Working Group, read as follows:

> "The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by *[specify the court, courts or authority competent to perform those functions in the enacting State]*."

119. It was agreed that the title of article 4 should read "competent authority", an expression which was found to be sufficiently broad to encompass also reference to the competent court of the enacting State.

120. The view was expressed that article 4 contained a definition of the competent authority and that, therefore, the provision should be moved to article 2. In reply it was noted that the provision in article 4 was not a mere definition, as it allowed the enacting State to indicate the authority competent to carry out the functions referred to in article 4. It was important to keep article 4 as a separate provision since it helped the foreign representative identify the authority to which he or she had to submit a request for recognition or cooperation.

121. For purposes of clarity, a suggestion was made to include in the article, after the words "foreign proceedings", the words "and of a foreign representative". The suggestion was not adopted, as it was considered that the recognition of a foreign representative was already covered by reference to the recognition of a foreign proceeding.

122. It was suggested to incorporate in the text of the article the reference to government-appointed officials or bodies who in some States exercised certain functions relating to insolvency proceedings, which was contained in the footnote to the current text. The view was expressed that, for purposes of clarity, inclusion of a reference to those officials in the text of the article was more appropriate than the negative formulation contained in the footnote. The prevailing view, however, was that reference to those officials should be retained in the footnote, as an option for those States to which the footnote applied, since a number of States did not have those categories of officials. In order to clarify the scope of the footnote, the guide to enactment should provide examples of the categories of government-appointed officials referred to in the footnote.

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[a] A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision:

> "Nothing in this Law affects the provisions in force in this State governing the authority of [*insert the designation of the government-appointed person or body]*".

Article 5. Authorization of *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* to act in a foreign State

123. The text of the article, as considered by the Working Group, read as follows:

"A *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* is authorized to act in a foreign State on behalf of a proceeding in this State under *[insert names of laws of the enacting State relating to insolvency]*, as permitted by the applicable foreign law."

124. The substance of article 5 was approved by the Working Group.

Article 6. Public policy exceptions

125. The text of the article, as considered by the Working Group, read as follows:

"Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be [manifestly] contrary to the public policy of this State."

126. The Working Group decided to delete the square brackets around the word "manifestly", so as to make it clear that the public policy exception was to be given a restrictive interpretation, as had been proposed at the twentieth session of the Working Group (A/CN.9/433, para. 160).

127. The Working Group was informed that some States, in enacting a public policy provision such as the one contained in article 6, might need to expressly construe the scope of such public policy exceptions as relating to fundamental principles of law, in particular the constitutional guarantees and individual rights.

128. A suggestion was made to redraft article 6 in a positive manner along the following lines: "The court may refuse to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State." The suggestion was objected to on the ground that the proposed wording might be interpreted as requiring the court to ascertain whether each individual request for relief or other action under the Model Provisions was not manifestly contrary to the public policy of the enacting State.

Chapter II. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN THIS STATE

Article 7. Access of foreign representatives to courts in this State

129. The text of the article, as considered by the Working Group, read as follows:

"A foreign representative is entitled to apply directly to a competent court in this State for the purpose of obtaining any relief available under this Law."

130. There was general agreement in the Working Group that the purpose of the article was to allow direct access by the foreign representative to courts of the enacting State, thus freeing the foreign representative of formalities such as any diplomatic or consular channels. Views differed, however, as to whether such direct access applied only to the court referred to in article 4 or whether it covered also other courts that might be called upon to provide relief to the foreign representative (in particular in the context of article 15 dealing with pre-recognition relief).

131. According to one view, direct access should be restricted to the court referred to in article 4. It was said that providing direct access to all courts of the enacting State would be inconsistent with the scope of application of the Model Provisions, that it was unnecessary to include all courts of the enacting State under the preferential regime of article 7 and that such a broad rule might cause confusion when the foreign representative would be seeking relief in the enacting State.

132. Another view was that the article, while expressly providing direct access to the court specified in article 4, should make it clear that the Model Provisions did not deal with, or restrict, the right to obtain relief from other courts in the enacting State when that was possible under local law.

133. According to yet another view, which eventually prevailed, the article should be limited to expressing the principle of direct access by the foreign representative to courts of the enacting State, without dealing with the competence of the courts or with relief that they could grant. It was pointed out that the foreign representative might have to apply for relief to a court other than the court referred to in article 4 (for example, when the competence of the court was determined according to the location of the asset with respect to which provisional relief was sought).

Article 8. Limited jurisdiction

134. The text of the article, as considered by the Working Group, read as follows:

> "The sole fact that a request pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the request."

135. The Working Group reaffirmed its position regarding that article, which had been expressed at its previous session (A/CN.9/433, paras. 69-70), and according to which the provision was a useful "safe conduct" rule aimed at ensuring that the court in the enacting State should not assume jurisdiction over the entire debtor's assets on the sole ground of the foreign representative having made an application for recognition of a foreign proceeding. The substance of the article was approved subject to replacing the expression "a request" by the words "an application".

136. However, it was noted that in a number of States the article was not necessary, since their rules on jurisdiction did not allow a court to assume jurisdiction over an applicant on the sole ground of the applicant's appearance before the court.

Article 9. Request by a foreign representative for opening of a proceeding under *[insert names of laws of the enacting State relating to insolvency]*

137. The text of the article, as considered by the Working Group, read as follows:

> "A foreign representative is entitled to request the opening of proceedings in this State under *[insert names of laws of the enacting State relating to insolvency]* if the conditions for opening such proceedings under the law of this State are met."

138. Interventions were made to suggest that the right to request the opening of insolvency proceedings should not be extended to a representative in a foreign non-main proceeding. It was pointed out that the opening of a proceeding might interfere with the administration of the main proceeding and that, in the interest of enhancing the cooperation and coordination in insolvency proceedings, only a representative in a foreign main proceeding should be granted that right.

139. However, pursuant to another view, which eventually prevailed, the proposed amendment should not be adopted, as it would render the article excessively rigid. In support of retaining the current wording, it was noted that a representative in a non-main proceeding might have a legitimate interest in requesting the opening of a proceeding in the enacting State, for instance, where no main proceeding within the meaning of the draft Model Provisions had been opened. Also, it was pointed out that the proposed limitation would not by itself avoid the opening of a local proceeding, since a representative in a non-main proceeding might easily circumvent the proposed rule by arranging for a creditor to submit the request for the opening of a local proceeding. Furthermore, it was noted that article 9 only gave standing to the foreign representative for making an application to the court, so that a request for the opening of a local proceeding would still need to be considered on its own merits.

140. The Working Group discussed at length the question whether the foreign representative's right to request the opening of insolvency proceedings in the enacting State should depend on recognition of the foreign proceeding.

141. Various interventions were made in favour of giving the foreign representative that right without requiring prior recognition. It was pointed out that, in practice, a request for the opening of a local insolvency proceeding might typically come into consideration at the initial stages of the foreign insolvency proceeding, often to secure control over the assets of the debtor. In such emergency situations, the foreign representative might not yet be in a position to comply with all the requirements of the enacting State for recognition of his or her status. Although article 13 represented an improvement to the existing system, in some jurisdictions the recognition might entail some delay and might not be available at the time needed by the foreign representative.

142. However, strong support was expressed for making the recognition of the foreign representative a necessary condition for the right to request the opening of insolvency proceedings in the enacting State. It was stated that an alleged urgent need for preserving the assets of the debtor did not constitute sufficient reason for giving the foreign representative the right to request the opening of insolvency proceedings prior to recognition. Article 15 already dealt with emergency situations by authorizing the court to grant provisional relief upon application for recognition.

143. It was further noted that the recognition was the procedure whereby the foreign representative was given standing before the courts of the enacting State for the purposes of the draft Model Provisions. Accordingly, the relief under article 16 was only available upon recognition, and the provisional relief provided in article 15 required at least the filing of an application for recognition. Thus, waiving the requirement of prior recognition in article 9 would bring that article into conflict with those other articles of the draft Model Provisions. Also, it would not be logical to allow a foreign representative not yet recognized as such in the enacting State to request the opening of local proceedings under article 9, while at the same time requiring prior recognition for the foreign representative's right to participate in existing proceedings under article 10.

144. In the course of the discussion, a number of suggestions were made so as to achieve a compromise between the two conflicting views expressed in the Working Group. One proposal was to waive the requirement for prior recognition in article 9, while providing that the foreign representative had to provide proof, satisfactory to the court, of his or her status in the State where the proceeding had originated. However, reservations were expressed to that proposal, which was held to establish an undesirable double system of recognition: a provisional recognition limited to the purposes of article 9, and full-fledged recognition for all other purposes of the draft Model Provisions. It was noted that article 13 provided minimum essential requirements for the recognition of a foreign representative and that it would not be appropriate to lower those standards for the purposes of article 9.

145. Another proposal was that article 9 should be redrafted to the effect that, provided adequate proof of the status of the foreign representative was given to the court, the foreign representative could request the recognition of a foreign proceeding or request the opening of a local proceeding, when no local proceeding already existed in respect of the debtor. That proposal, however, was considered to be excessively complex for the limited purpose of the article and did not attract sufficient support.

146. After considering all the views expressed and proposals made, and noting the lack of a consensus on the subject, the Working Group decided to insert the words "upon recognition," within square brackets at the beginning of article 9.

Article 10. Participation of a foreign representative in a proceeding under *[insert names of laws of the enacting State relating to insolvency]*

147. The text of the article, as considered by the Working Group, read as follows:

> "Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding concerning the debtor in this State under *[insert names of laws of the enacting State relating to insolvency]*."

148. A suggestion was made to restrict the right of participation of representatives of foreign non-main proceedings to cases where the participation in the insolvency proceeding in the enacting State "relates to assets falling under the authority of the foreign representative or concerns information required in that foreign non-main proceeding", the formulation proposed to be included in article 17 (see para. 53 above). The suggestion was not adopted since it would be difficult, or inappropriate, to link proposals of the foreign representative to particular assets.

149. The expression "to participate" was criticized as being unclear and not specifying which actions were covered by it. It was proposed to replace the expression "to participate" by the words "to intervene", which were used in article 20 to refer to the appearance by the foreign representative in individual actions brought by the debtor or against the debtor (see para. 79 above). The proposal was not adopted on the ground that the situation in article 10 (a collective insolvency proceeding) was fundamentally different from that of article 20 (individual action by or against the debtor); it was said that, because of the difference in the conditions for, and the nature of, the foreign representative's appearance in the two situations, the use of the same expression would be confusing.

150. According to one view the provision could be made clearer if, instead of (or in addition to) the expression "to participate", language were used along the lines of "to be heard in an insolvency proceeding and to make proposals therein". That proposal was supported on the condition that the ways of participation in the proceedings were not listed exhaustively. However, the prevailing view was that the expression "to participate" should be retained, since it captured in a flexible way the various purposes for which the foreign representative might appear in an insolvency

proceeding in the enacting State. It was considered that the guide to enactment should explain that, in enacting the article, the expression "participate" might have to be replaced by an expression which in that national law best expressed the intended meaning.

Article 11. Access of foreign creditors to a proceeding under *[insert names of laws of the enacting State relating to insolvency]*

151. The text of the article, as considered by the Working Group, read as follows:

"(1) Subject to paragraph (2), foreign creditors have the same rights regarding the opening of, and participation in, a proceeding in this State under *[insert names of laws of the enacting State relating to insolvency]* as creditors [that are citizens of this State or are resident, domiciled or have a registered office] in this state.

"(2) The provision in paragraph (1) of this article does not affect the ranking of claims in a proceeding under *[insert names of laws of the enacting State relating to insolvency]*, except that the claims of foreign creditors shall not be ranked lower than general (non-priority or non-preference) claims.[b]"

152. The view was expressed that the words "foreign creditors", as used in paragraph (1), were unclear, and that criteria (such as nationality or domicile) were needed for establishing who would be regarded as a foreign creditor. As it was not realistic to attempt to formulate a uniform definition of those criteria, it was suggested to redraft paragraph (1) to the effect that all creditors should be treated in the same manner, without discrimination based on nationality or other grounds, except as provided in paragraph (2). In response it was pointed out that the reference to the same rights "regarding the opening of, and participation in, a proceeding" were needed so as to circumscribe the scope of the equal treatment under paragraph (1). It was, however, proposed that the words in square brackets in paragraph (1) were not needed and should be deleted.

153. In respect of paragraph (2), it was pointed out that in some legal systems the payment of certain categories of claims (such as fines and other pecuniary sanctions, or claims whose payment was deferred) were ranked lower than unsecured non-priority claims. It was suggested that paragraph (2), which placed foreign claims on equal footing with local non-priority claims, should be redrafted so as to make it clear that foreign claims would not receive better treatment than those local claims whose payment was deferred.

"[b] The enacting State may wish to consider the following alternative wording to replace article 11(2):

"(2) The provision in paragraph (1) of this article does not affect the ranking of claims in a proceeding under *[insert names of laws of the enacting State relating to insolvency]* and the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than general (non-priority or non-preference) claims."

154. The word "general" in paragraph (2) was found to be unnecessary. It was suggested that it might be sufficient to refer to "non-priority or non-preference claims". The Working Group agreed to delete the word "general" as well as the parenthesis around the words "non-priority or non-preference".

155. It was noted that foreign tax and social security claims were not expressly excluded from the ambit of paragraph (2). Thus, strong support was expressed for retaining the option contained in the footnote, since a number of jurisdictions would have difficulties in enacting the Model Provisions if they did not expressly reserve the possibility for the enacting State to exclude foreign tax and social security claims.

156. The view was expressed that the article should confine itself to affirming the principle that, subject to the priorities of the law of the enacting State, all creditors should be granted the same rights irrespective of nationality, residence or domicile.

Article 12. Notification to foreign creditors of a proceeding under *[insert names of laws of the enacting State relating to insolvency]*

157. The text of the article, as considered by the Working Group, read as follows:

"(1) Whenever a notification of commencement of proceedings under *[insert names of laws of the enacting State relating to insolvency]* is required under the law of this State for creditors in this State, such notification shall be made to known creditors not resident, domiciled or with a registered office in this State.

"(2) Notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate.

"(3) The notification shall:

"(a) indicate a reasonable time period for filing claims and specify the place for filing of claims;

"(b) indicate whether secured creditors need to file their secured claims; and

"(c) contain any other information required to be included in notifications to creditors pursuant to the law of this State and the orders of the court."

General remarks

158. The view was expressed that, for the sake of consistency, the same meaning should be given to the notion of "foreign creditor" in articles 11 and 12. In response it was said that articles 11 and 12 had different purposes and that the Working Group was following a pragmatic approach by not providing a definition of "foreign creditors" and by dealing with that notion, in the few instances where it was mentioned, within the specific context of the provision to which it related.

Paragraph (1)

159. It was noted that one of the main purposes of the notification requirements under article 12 was to inform creditors of the time limit to file their claims and the form in which claims had to be filed. However, in many cases the deadline for filing claims was not established upon commencement of the proceedings, but at a later stage.

Therefore, it was proposed that, instead of requiring notification of commencement of the proceedings, paragraph (1) should require notification of foreign creditors whenever the law of the enacting State required notification to be given to all creditors.

160. As regards the foreign creditors that had to be given notification pursuant to paragraph (1), the Working Group considered whether such notification was to be given to known creditors "not resident, domiciled or with a registered office" in the enacting State, as currently provided in paragraph (1), or to known creditors "without an address" in the enacting State. In favour of retaining the wording of paragraph (1) it was stated that the word "address" was not a legal concept and could encompass even a seasonal or transitory location. The notions of "residence", "domicile" or "registered office", in turn, were known to a number of legal systems, which would facilitate the application of paragraph (1) by the court of the enacting State. The prevailing view, however, was that the current formulation of paragraph (1) was excessively rigid and would expose the court of the enacting State to arguments as to whether foreign creditors had their "residences", "domiciles" or "registered offices" at the addresses identified by the court. Therefore, it was held preferable to refer in paragraph (1) to known creditors "without an address in this State".

Paragraph (2)

161. It was pointed out that debtors' records were often incomplete or deficient and that, in practice, it was often difficult to establish, solely on the basis of the documentation in the insolvency proceeding, a complete list of creditors. Thus, in some jurisdictions attempts were made, through advertisement or other publication procedures, to reach also other creditors not yet known to the court or the insolvency administrator. Since paragraph (1) only referred to notifications to known creditors without an address in the enacting State, it was suggested that paragraph (2) should contain language that contemplated attempts to reach also unknown creditors, through the form of notification deemed appropriate by the court, when the cost of such attempts did not unreasonably burden the proceedings.

Paragraph (3)

162. As a result of the changes that had been approved to paragraph (1), it was proposed to amend paragraph (3) so as to clarify that the information referred to therein was required only for the initial notification issued to foreign creditors.

163. It was noted that, in some legal systems, a secured creditor who filed a claim in an insolvency proceeding might be deemed to have waived the security or some of the privileges attached to the credit. Thus, it was suggested that paragraph (3) (b) should require information to be provided as to whether a secured creditor jeopardized its security by filing the claim. In response it was said that it would be sufficient for the guide to enactment to refer to that possibility, indicating that enacting States where those situations might arise might wish to include information as to the effects of filing claims by secured creditors in the notification to be given pursuant to paragraph (3).

164. A suggestion was made to expand the information required to be contained in the notification, so as to include information on the total value of the debts and assets of the debtor. That proposal did not attract sufficient support, since it was considered that such information might not always be available at the time of commencement of the proceeding. However, nothing in the draft Model Provisions prevented the court of the enacting State from providing such information, where it was available.

Article 13. Recognition of a foreign proceeding for the purpose of obtaining relief

165. The text of the article, as considered by the Working Group, read as follows:

"(1) A foreign representative may apply to the competent court for recognition of the foreign proceeding and of the foreign representative's appointment.

"(2) An application for recognition shall be accompanied by:

"(a) the duly authenticated decision [or decisions] opening the foreign proceeding and appointing the foreign representative; or

"(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

"(c) in the absence of proof referred to in subparagraphs (a) and (b), any other proof acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

"(3) Subject to article 14, the foreign proceeding shall be recognized

"(a) as a foreign main proceeding if the foreign court has jurisdiction based on the centre of the debtor's main interests; or

"(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2 (g) in the foreign State.

"(4) Absent proof to the contrary, the registered seat of the debtor is deemed to be the centre of its main interests.

"(5) If the decision or certificate referred to in paragraph (2) indicates that the foreign proceeding is a proceeding as defined in article 2 (a) and that the foreign representative has been appointed within the meaning of article 2 (e), the court is entitled to so presume.

"(6) No legalization of documents supplied in support of the application for recognition or other similar formality is required.

"(7) The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

"[(8) An application for recognition of a foreign proceeding shall be decided upon expeditiously]."

General remarks

166. It was agreed to change the title of article 13 to read "Recognition of a foreign proceeding and of a foreign representative". It was also agreed that, at least in the English text, the word "proof" should be replaced by the word "evidence".

167. It was suggested to extend the right to apply for recognition of a foreign proceeding to creditors in the enacting State, since they might have an interest in establishing a channel of cooperation between the court of the enacting State and the court of the foreign main proceeding, rather than simply filing their claims abroad, particularly in cases where the assets of the debtor in the enacting State were not sufficient for the payment of local claims. In response it was noted that the recognition of the foreign proceeding was not an adequate solution for such a situation, since the recognition was not conceived as a mechanism for securing cooperation and access by the local creditors to the foreign proceeding, a matter which was dealt with by articles 11 and 21.

Paragraph (2)

168. It was suggested that the foreign representative should be required to submit evidence that enabled the court to establish whether the proceeding for which recognition was sought was a main proceeding or a non-main proceeding. The countervailing view, however, was that such a provision was not needed, since it would be in the foreign representative's own interest to supply the court with all the necessary evidence in order to expedite the recognition procedures. In any event, if the Working Group decided to adopt the proposal, it would be necessary to consider what would be the appropriate place to insert it, since paragraph (2) contained alternative provisions. Also, the Working Group would need to consider what form of evidence should be required for that purpose. For lack of time, the Working Group did not reach a conclusion on that matter.

169. It was agreed that the guide to enactment should explain that the words "duly authenticated", if retained, in paragraph (2) (a) did not mean that the foreign decision was subject to legalization procedures of the type referred to in paragraph (6).

Paragraph (4)

170. For purposes of consistency with the wording used in the European Union Convention on Insolvency Proceedings, it was suggested to use the expression "registered office" rather than "registered seat". Also, with a view to clarifying that paragraph (4) also covered insolvencies of individuals, it was proposed to redraft paragraph (4) to provide that, absent proof to the contrary, the registered office was deemed to be the centre of the main interests of a legal entity, and the habitual residence was deemed to be the centre of the main interests of an individual.

Paragraph (5)

171. Questions were raised as to the need for paragraph (5), since that provision was not intended to be binding upon the recognizing court. In reply it was noted that in some jurisdictions it was useful to expressly enable the court to make decisions based on the presumptions established by paragraph (5), so as to avoid litigation or obviate the need for lengthy arguments as to the nature of the foreign proceeding and the appointment of the foreign representative.

Paragraph (6)

172. The paragraph received strong support. However, a view was expressed that it would go too far if even in exceptional circumstances no legalization would be required.

Paragraph (8)

173. It was agreed to delete the square brackets around paragraph (8) and to replace the word "expeditiously" by the words "at the earliest possible time".

Article 14. Grounds for refusing recognition

174. The text of the article, as considered by the Working Group, read as follows:

"Recognition of a foreign proceeding and of the appointment of the foreign representative may be refused only where:

"(a) the foreign proceeding is not a proceeding as defined in article 2(a) or the foreign representative has not been appointed within the meaning of article 2(e); or

"[(b) the debtor is a *[insert the designations of specially regulated financial services institutions]*, if the debtor's insolvency in this State is subject to special regulation in *[insert names of laws of the enacting State relating to insolvency of such institutions]*]."

175. It was widely considered that the word "only" in the chapeau of the article was inappropriate since other grounds for refusal of recognition were to be included in the Model Provisions or were already mentioned in the Model Provisions (article 6 on public policy). The view was expressed that the word "only" should be retained and any grounds for refusal or recognition should be listed or referenced in article 14.

176. Various proposals were made for inclusion of other grounds for refusal of recognition. Those grounds were: the existence of a (main) proceeding in the enacting State or prior recognition in the enacting State of a foreign main proceeding that had been opened in a third State; insufficiency of evidence submitted in support of the request for recognition, or non-compliance with other requirements set out in article 13; the fact that the foreign non-main proceeding had been commenced in a State where the debtor had assets but no establishment as defined in article 2(g); the foreign proceeding was one concerning a consumer as opposed to a commercial person or entity; and the need to protect the interests of creditors in the enacting State. Opposition was expressed with regard to including open-ended general grounds since article 6 on public policy already offered a sufficiently broad scope for refusal of recognition.

177. A view was expressed that, as an alternative to the enumeration of the grounds on which recognition might be refused, the Model Provisions could contain a definition of the effects limited to coordination and cooperation, to be granted to the recognized foreign proceeding when a local proceeding is already pending in the enacting State. Strong objections were raised against that view.

178. It was observed that, if the existence of a proceeding in the enacting State was to be included as a reason for refusing recognition of a foreign proceeding, that would be in conflict with article 10, which allowed the foreign representative to participate in the proceeding in the enacting State only upon recognition of a foreign proceeding. It was understood that the provisions of article 14 would be drafted in harmony with the provisions of article 10.

179. It was noted that subparagraph (b) provided that recognition could be refused where the debtor was a financial services institution such as a bank if the particular insolvency was subject to special regulation in the enacting State. It was, however, suggested that cross-border aspects of insolvencies of such institutions should be excluded from the ambit of the Model Provisions altogether. One reason was that cross-border insolvencies of banks raised particular problems that were currently not dealt with, or were not dealt with adequately, in the Model Provisions. Furthermore, those problems were currently studied in other forums and it was suggested that it was therefore premature to include them in the ambit of the Model Provisions prior to a conclusion being reached in those other forums. It was also suggested that cross-border insolvencies of insurance companies gave rise to special regulatory concerns and that

therefore those insolvencies too should not be governed by the Model Provisions. The Working Group agreed with those suggestions.

Chapter V. CONCURRENT PROCEEDINGS

Article 22. Concurrent proceedings

180. The text of the article, as considered by the Working Group, read as follows:

"(1) Upon recognition of a foreign main proceeding, the courts of this State have jurisdiction to open a proceeding in this State against the debtor under *[insert names of laws of the enacting State relating to insolvency]* only if the debtor has [an establishment] [or assets] in this State[, and the effects of those proceedings shall be restricted to the [establishment] [or] [assets] of the debtor situated in the territory of this State].

"(2) Recognition of a foreign insolvency proceeding is, for the purposes of opening proceedings in this State referred to in paragraph (1) and in the absence of evidence to the contrary, proof that the debtor is insolvent."

Paragraph (1)

181. There was general agreement in the Working Group that, in the situation dealt with in paragraph (1), the court of the enacting State should be able to open an insolvency proceeding not only when the debtor had an establishment in the enacting State but also when it had assets in that State. That solution was considered realistic in view of the fact that a number of States currently allowed the opening of such insolvency proceedings based on the presence of assets in the State. The solution was supported also on the ground that the foreign representative who believed that opening of a local insolvency proceeding was in the best interest of creditors should not face jurisdictional obstacles when requesting the opening of such a proceeding.

182. After the Working Group adopted that solution, it was suggested that, if the presence of assets in the enacting State was sufficient for opening local insolvency proceedings, paragraph (1) could be deleted. That suggestion was opposed on the ground that the provision was still useful as an indication that grounds for jurisdiction other than the presence of assets were not sufficient, and because the paragraph also provided a solution as to the effects of a proceeding opened in the enacting State after recognition of a foreign main proceeding.

183. Support was expressed for the solution in paragraph (1), according to which, after recognition of a foreign main proceeding, the effect of the proceeding opened in the enacting State was to be restricted to the territory of the enacting State.

Paragraph (2)

184. The Working Group approved the substance of paragraph (2).

B. Consideration of principles underlying possible new provisions on concurrent proceedings

185. It was noted that chapter V, "Concurrent proceedings" (arts. 21 and 22), did not deal with a number of issues relating to a situation where, in addition to a foreign insolvency proceeding, an insolvency proceeding had been or might be opened in the enacting State. The Working Group engaged in a discussion of principles that should be taken into account in the formulation of provisions on concurrent proceedings.

Principle 1

186. The Working Group discussed the following principle:

"1. There can only be one main proceeding. The court shall decide which proceeding is the main proceeding."

187. While there was agreement on the principle, it was observed that the objective of the principle might not always be achieved, in particular where both the foreign court and the court in the enacting State decided that the proceedings opened in their respective States were main proceedings. It was considered that in such a case the court of the enacting State should treat the foreign proceeding as a non-main proceeding and would cooperate with the foreign court accordingly.

Principle 2

188. The Working Group discussed the following principle:

"2. The recognition of a foreign proceeding shall not restrict the right to commence a local proceeding."

189. It was noted that article 22 covered that principle.

Principle 3

190. The Working Group discussed the following principle:

"3. A local proceeding shall prevail over the effects of recognition of a foreign proceeding and over relief granted to a foreign representative."

191. Support was expressed for the principle. It was said that, once a local proceeding was opened, the effects of the recognized foreign proceeding should be reassessed and should be adjusted or terminated in such a way that they did not disturb the administration of the debtor's assets in the enacting State. It was stressed that the provision relating to such adjustment or termination should be flexible enough so as to make it possible to take into consideration factors such as fairness, the need to coordinate concurrent proceedings, acquired rights, the disturbance caused by preventing approved actions from being carried out and the general principle of leaving in place measures that did not disturb the proceeding in the enacting State. A related proposal was to specify in the Model Provisions which relief granted for the benefit of the foreign proceeding (or which effect of recognition of the foreign proceeding) should or could be displaced as a result of the opening of the local proceeding. However, it was also observed that the

adoption of the principle without due regard to whether the local proceeding was a main or non-main proceeding would conflict with a long-standing approach of particularly common-law countries to that issue.

Principle 4

192. The Working Group discussed the following principle:

"4. When there are two or more proceedings, there shall be cooperation and coordination."

193. The Working Group endorsed the principle and noted that it was covered by article 21.

Principle 5

194. The Working Groups discussed the following principle:

"5. Coordination may include granting relief to the foreign representative. In granting relief to a foreign representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets falling under the authority of the foreign representative."

195. The view was expressed that, in order to obtain cooperation under article 21, the foreign representative should apply for recognition of the foreign proceeding. That meant, it was said, that the Model Provisions should distinguish between recognition for the purpose of obtaining cooperation and coordination under article 21 and recognition for the purpose of obtaining relief or effects pursuant to articles 10, 16, 17 and 20. It was further said that cooperation between two concurrent proceedings would be refused when recognition of the foreign proceeding was refused; it was added that the existence of a proceeding in the enacting State should be one ground for refusal of recognition.

196. Wide opposition was expressed against that view. It was stressed that recognition should be required only for obtaining relief or effects pursuant to articles 10, 16, 17 and 20 and that, in particular, no formal recognition was needed to obtain cooperation under article 21. Such a requirement would run counter the current practice, pursuant to which judicial cooperation, when granted, was granted without prior recognition. Views were expressed that it would be undesirable and overly complicated to introduce two types of recognition, one for the purposes of cooperation and one for other purposes.

Principle 6

197. The Working Group discussed the following principle:

"6. Creditors shall be allowed to file claims in any proceeding. Payments to creditors from multiple proceedings shall be equalized."

198. The Working Group endorsed the principle and noted that it was covered by articles 11 and 23.

Principle 7

199. The Working Group discussed the following principle:

"7. If there are surplus proceeds of a local non-main proceeding, they shall be transferred to the main proceeding."

200. The Working Group was in agreement with the principle.

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ANNEX

Draft UNCITRAL Model Legislative Provisions on
Cross-Border Insolvency

(Note: The draft articles contained in this annex were prepared pursuant to the deliberations of the Working Group at the current session. However, for lack of time, these draft articles were not reviewed by the Working Group during the session. The preamble and draft articles 1 to 11 and 15 to 21 were prepared by an informal drafting group, which, pursuant to a decision of the Working Group, met during the session. Draft articles 12 to 14 and 22 were prepared by the Secretariat. Draft article 23 was, for lack of time, not considered at the session.)

PREAMBLE

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

(a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;

(b) greater legal certainty for trade and investment;

(c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

(d) protection and maximization of the value of the debtor's assets; and

(e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Chapter I. GENERAL PROVISIONS

Article 1. Scope of application

(1) This [Law] [Section] applies where:

(a) assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or

(b) assistance is sought in a foreign State in connection with a proceeding in this State under *[identify laws of the enacting State relating to insolvency]*; or

(c) a foreign proceeding and a proceeding in this State under *[identify laws of the enacting State relating to insolvency]* in respect of the same debtor are taking place concurrently; or

(d) creditors or other interested parties in a foreign State have an interest in requesting the commencement of or participating in a proceeding in this State under *[identify laws of the enacting State relating to insolvency]*.

(2) This [Law][Section] does not apply where the debtor is a *[insert the designations of specially regulated financial services institutions such as banks and insurance companies]*, if the debtor's insolvency in this State is subject to special regulation.

Article 2. Definitions

For the purposes of this Law:

(a) "foreign proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in a foreign State in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) "foreign main proceeding" means a proceeding taking place in the State where the debtor has the centre of its main interests;

(c) "foreign non-main proceeding" means a proceeding taking place in the State where the debtor has an establishment within the meaning of subparagraph (f) of this article;

(d) "foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

(e) "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;

(f) "establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

Article 3. International obligations of this State

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

Article 4. Competent authority[a]

The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by *[specify the court, courts or authority competent to perform those functions in the enacting State]*.

Article 5. Authorization of *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* to act in a foreign State

A *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* is authorized to act in a foreign State on behalf of a proceeding in this State under *[identify laws of the enacting State relating to insolvency]*, as permitted by the applicable foreign law.

Article 6. Public policy exceptions

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

Chapter II. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN THIS STATE

Article 7. Right of direct access

A foreign representative is entitled to apply directly to a court in this State.

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[a] A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision:

Nothing in this Law affects the provisions in force in this State governing the authority of *[insert the designation of the government-appointed person or body]*.

Article 8. Limited jurisdiction

The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.

Article 9. Application by a foreign representative to commence a proceeding under *[identify laws of the enacting State relating to insolvency]*

[Upon recognition,] a foreign representative may apply to commence a proceeding in this State under *[identify laws of the enacting State relating to insolvency]* if the conditions for commencing such a proceeding under the law of this State are otherwise met.

Article 10. Participation of a foreign representative in a proceeding under *[identify laws of the enacting State relating to insolvency]*

Upon recognition of a foreign proceeding, the foreign representative may participate in a proceeding concerning the debtor in this State under *[identify laws of the enacting State relating to insolvency]*.

Article 11. Access of foreign creditors to a proceeding under *[identify laws of the enacting State relating to insolvency]*

(1) Subject to paragraph (2) of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding in this State under *[identify laws of the enacting State relating to insolvency]* as creditors in this State.

(2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under *[identify laws of the enacting State relating to insolvency]*, except that the claims of foreign creditors shall not be ranked lower than *[identify the class of unsecured non-preference claims, while providing that a foreign claim is to be ranked lower than the unsecured non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the unsecured non-preference claims]*.[b]

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[b] The enacting State may wish to consider the following alternative wording to replace article 11 (2):

(2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under *[identify laws of the enacting State relating to insolvency]* and the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than *[identify the class of unsecured non-preference claims, while providing that a foreign claim is to be ranked lower than the unsecured non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the unsecured non-preference claims]*.

Article 12. Notification to foreign creditors of a proceeding under *[identify laws of the enacting State relating to insolvency]*

(1) Whenever under *[identify laws of the enacting State relating to insolvency]* notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have an address in this State. [The court may order that appropriate steps be taken with a view to notifying any creditors whose address is not yet known.]

(2) Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate.

(3) When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:

(a) indicate a reasonable time period for filing claims and specify the place for filing of claims;

(b) indicate whether secured creditors need to file their secured claims; and

(c) contain any other information required to be included in notifications to creditors pursuant to the law of this State and the orders of the court.

Chapter III. RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

Article 13. Recognition of a foreign proceeding and of a foreign representative

(1) A foreign representative may apply to the competent court for recognition of the foreign proceeding and of the foreign representative's appointment.

(2) An application for recognition shall be accompanied by:

(a) the duly authenticated decision [or decisions] commencing the foreign proceeding and appointing the foreign representative; or

(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

(3) Subject to article 14, the foreign proceeding shall be recognized:

(a) as a foreign main proceeding if the foreign court has jurisdiction based on the centre of the debtor's main interests; or

(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2(f) in the foreign State.

(4) Absent proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is deemed to be the centre of the debtor's main interests.

(5) If the decision or certificate referred to in paragraph (2) of this article indicates that the foreign proceeding is a proceeding as defined in article 2(a) and that the foreign representative has been appointed within the meaning of article 2(d), the court is entitled to so presume.

(6) No legalization of documents supplied in support of the application for recognition or other similar formality is required.

(7) The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

(8) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

Article 14. Grounds for refusing recognition

[Subject to article 6,] recognition of a foreign proceeding and of the appointment of the foreign representative may be refused only where:

(a) the foreign proceeding is not a proceeding as defined in article 2(a) or the foreign representative has not been appointed within the meaning of article 2(d); or

(b) ...*

Article 15. Relief upon application for recognition of a foreign proceeding

(1) From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where necessary to protect the assets of the debtor or the interests of the creditors, grant any relief mentioned in article 17.

(2) *[Insert provisions (or refer to provisions in force in the enacting State) relating to notice].*

(3) Unless extended under article 17(1)(c), the relief granted under this article terminates when the application for recognition is decided upon.

(4) The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

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* Subparagraph (b) would be the appropriate location for including any additional ground for refusing to recognize a foreign proceeding, should the Commission so decide.

Article 16. Effects of recognition of a foreign main proceeding

(1) Upon recognition of a foreign main proceeding,

(a) the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities are stayed;

(b) the right to transfer, dispose of or encumber any assets of the debtor are suspended.

(2) The scope of the stay and suspension referred to in paragraph (1) of this article is subject to *[refer to any exceptions or limitations that are applicable under laws of the enacting State relating to insolvency]*.

(3) Paragraph (1)(a) of this article does not affect the right to commence individual actions or proceedings, to the extent this is necessary to preserve a claim against the debtor.

(4) Paragraph (1) of this article does not affect the right to request the commencement of a proceeding under *[identify laws of the enacting State relating to insolvency]* or the right to file claims in such a proceeding.

[(5) This article does not apply if, at the time of application for recognition, a proceeding is pending concerning the debtor under *[identify laws of the enacting State relating to insolvency]*.]

Article 17. Relief that may be granted upon recognition of a foreign proceeding

(1) Upon recognition of a foreign main or non-main proceeding, where necessary to protect the assets of the debtor or the interests of creditors, the court may, at the request of the foreign representative, grant any appropriate relief including:

(a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under article 16(1)(a);

(b) suspending the right to transfer, dispose of or encumber any assets of the debtor to the extent they have not been suspended under article 16(1)(b);

(c) extending relief granted under article 15;

(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) entrusting the administration and realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;

(f) granting any additional relief that may be available to *[insert the title of a person or body administering a liquidation or reorganization under the law of the enacting State]* under the laws of this State.

(2) Upon recognition of a foreign main or non-main proceeding, the court may entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

(3) In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets falling under the authority of the foreign representative or concerns information required in that foreign non-main proceeding.

Article 18. Notice of recognition and relief granted upon recognition

Notice of recognition of a foreign proceeding [and of the effects of recognition of a foreign main proceeding under article 16] shall be given in accordance with *[the procedural rules governing notice of [the commencement of] a proceeding under the insolvency laws of this State]*.

Article 19. Protection of creditors and other interested persons

(1) In granting or denying relief under article 15 or 17, and in modifying or terminating relief under this article, the court [shall take into account the interests of the creditors and other interested persons, including the debtor] [must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected].

(2) The court may subject such relief to conditions it considers appropriate.

(3) Upon request of a person or entity affected by relief granted under article 15 or 17, [or by the stay or suspension pursuant to article 16(1)], the court may modify or terminate such relief [, stay or suspension] [, taking into account the interests of the creditors and other interested persons, including the debtor].

Article 19 bis. Actions to avoid acts detrimental to creditors

Upon recognition of a foreign proceeding, the foreign representative [is permitted] [has standing] to initiate *[refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available, according to the law of the enacting State, to the local insolvency administrator in the context of insolvency proceedings in the enacting State]*.

Article 20. Intervention by a foreign representative in actions in this State

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in [individual actions] [proceedings] in which the debtor is a [claimant or defendant] [party].

Article 21. Authorization of cooperation and direct communication with foreign courts and foreign representatives

(1) In matters referred to in article 1, a court referred to in article 4 shall cooperate to the maximum extent possible with foreign courts, either directly or through a *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* or a foreign representative. The court is permitted to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

(2) In matters referred to in article 1, a *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* shall, in the exercise of its functions and [subject to the supervision] [without prejudice to the supervisory functions] of the court, cooperate to the maximum extent possible with foreign courts and foreign representatives. The *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* is permitted, in the exercise of its functions and [subject to the supervision] [without prejudice to the supervisory functions] of the court, to communicate directly with foreign courts or foreign representatives.

(3) Cooperation may be implemented by any appropriate means, including:

(a) appointment of a person or body to act at the direction of the court;

(b) communication of information by any means deemed appropriate by the court;

(c) coordination of the administration and supervision of the debtor's assets and affairs;

(d) approval or implementation by courts of agreements concerning the coordination of proceedings;

(e) [coordination of multiple proceedings regarding the same debtor] [coordination of main or non-main foreign proceedings and a proceeding in this State under *[identify laws of the enacting State relating to insolvency]* in respect of the same debtor;

(f) *[the enacting State may wish to list additional forms or examples of cooperation]*.

Article 22. Concurrent proceedings

(1) Upon recognition of a foreign main proceeding, the courts of this State have jurisdiction to commence a proceeding in this State against the debtor under *[identify laws of the enacting State relating to insolvency]* only if the debtor has assets in this State, and the effects of that proceeding shall be restricted to the assets of the debtor situated in the territory of this State.

(2) Recognition of a foreign insolvency proceeding is, for the purposes of commencing a proceeding in this State referred to in paragraph (1) of this article and in the absence of evidence to the contrary, proof that the debtor is insolvent.

Article 23. Rate of payment of creditors

Without prejudice to [secured claims] [rights in rem], a creditor who has received part

payment in respect of its claim in an insolvency proceeding commenced in another State may not receive a payment for the same claim in a proceeding commenced in this State under *[identify laws of the enacting State relating to insolvency]* with regard to the same debtor in this State, so long as the payment to the other creditors of the same class for their claims in the proceeding commenced in this State is proportionately less than the payment the creditor has already received.

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